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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11 KIMBERLY JONES, )  
12 Plaintiff(s), ) No. C 05-0997 BZ  
13 v. ) **ORDER ON DEFENDANTS'**  
14 DEJA VU, INC., et al., ) **MOTION TO DISMISS**  
15 Defendant(s). ) **"SUBCLASS ONE" CAUSES OF**  
16 ACTION

17 Now before me is defendants' motion to dismiss  
18 plaintiffs' second claim for unfair competition under the  
19 Sherman Act, 15 U.S.C. §§ 1, 2; third claim for tortious  
20 interference with economic relations; fourth claim for  
21 negligent interference with economic relations; and fifth  
22 claim for violation of the Racketeer Influence and Corrupt  
23 Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*<sup>1</sup>

24 Plaintiffs are eight exotic female dancers who have  
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26 <sup>1</sup> All parties have consented to the jurisdiction of  
27 a United States Magistrate Judge for all proceedings  
28 including entry of final judgment pursuant to 28 U.S.C. §  
636(c). Defendants have filed several other motions in this  
case, on which I have separately ruled.

1 brought this action on behalf of themselves and other  
2 similarly situated dancers who provide, or provided, nude  
3 and semi-nude live performances at various adult nightclubs  
4 in San Francisco (the "Plaintiff Class"). Plaintiffs'  
5 second through fifth claims relate to an alleged Plaintiff  
6 Subclass One which consists of those members of the  
7 Plaintiff Class who are, or have been during the relevant  
8 period, owners of the Lusty Lady, a San Francisco nightclub  
9 that allegedly competes with defendants.

10 Defendants motion to dismiss plaintiffs' second claim  
11 for violations of section 1 and 2 of the Sherman Act is  
12 **DENIED**. Section 1 of the Sherman Act prohibits agreements  
13 that unreasonably restrain trade. See 15 U.S.C. § 1. To  
14 state a claim under section 1, a plaintiff must allege:  
15 "(1) that there was a contract, combination or conspiracy;  
16 (2) that the agreement unreasonably restrained trade under  
17 either the per se or rule of reason analysis; and (3) that  
18 the restraint affected interstate commerce." Tanaka v.  
19 University of Southern Cal., 252 F.3d 1059, 1062 (9th Cir.  
20 2001) (citations and internal quotation marks omitted);  
21 Bhan v. NME Hospitals Inc., 929 F.2d 1404, 1410 (9th Cir.  
22 1991).

23 Defendants erroneously contend that plaintiffs have  
24 failed to allege the existence of a contract, combination  
25 or conspiracy. Plaintiffs allege that defendants are  
26 through illegal means, "concertedly restricting and  
27 diminishing legitimate business trade and commerce of its  
28 competitors . . . in an attempt to unreasonably restrain

1 trade." First Amended Compl. ("FAC") ¶ 99. The complaint  
2 also contains relatively detailed allegations concerning  
3 those facts that underlie defendants' concerted efforts to  
4 restrict competition. See e.g., FAC ¶¶ 39-50.

5 Defendants' contention that plaintiffs have failed to  
6 sufficiently define the relevant market also lacks merit.  
7 A plaintiff bears the initial burden of establishing that  
8 the restraint produces significant anticompetitive effects  
9 within the relevant product and geographic markets.

10 Tanaka, 252 F.3d at 1063. "The geographic market extends  
11 to the 'area of effective competition' . . . where buyers  
12 can turn for alternative sources of supply." Id. "The  
13 product market includes the pool of goods or services that  
14 enjoy reasonable interchangeability of use and cross-  
15 elasticity of demand." Id. (citations omitted).

16 The complaint alleges that defendants have restrained  
17 competition within "the regional San Francisco area - which  
18 is specifically defined as comprising San Francisco County,  
19 Alameda County, Marin County, Sonoma County, Contra Costa  
20 County, and San Mateo County." FAC ¶ 44, 99. It further  
21 alleges that the relevant product market is "nude and semi-  
22 nude dancing." FAC ¶ 41. While defendants may disagree  
23 with the plaintiffs' characterization of the relevant  
24 market based on the facts presented in their motion, these  
25 issues are not properly raised on a motion to dismiss. See  
26 Farr v. United States, 990 F.2d 451, 454 (9th Cir. 1993).

27 In their reply, defendants' raise several additional  
28 challenges to plaintiffs' Sherman Act claims, which are

untimely. See Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 843 n.6 (9th Cir. 2004) ("We decline to consider new issues raised for the first time in a reply brief."); Gold v. Wolpert, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989) ("It is well settled that new arguments cannot be made for the first time in reply."); Schwartz v. Upper Deck Co., 183 F.R.D. 672, 682 (S.D. Cal. 1999) ("It is well accepted that raising of new issues and submission of new facts in [a] reply brief is improper.") (citing Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996)). In any event, plaintiffs' have sufficiently alleged that defendants engaged in a number of anticompetitive acts, which decreased lawfully-operated clubs' ability to compete in the marketplace. See SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996); see e.g., FAC ¶¶ 88, 100-101.

Defendants' motion to dismiss plaintiffs' third cause of action for tortious interference with economic relations, or intentional interference with prospective economic advantage, is **GRANTED** with leave to amend. To state a claim for intentional interference prospective economic advantage, a plaintiff must allege: (1) the existence of a valid contract or some other economic relationship between the plaintiff and a third party containing a probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the existence of the relationship; (3) intentional acts on the part of the defendants designed to disrupt the relationship; (4) actual

1 disruption of the relationship; and (5) damages to the  
2 plaintiff proximately caused by defendants' acts. Blank v.  
3 Kirwin, 39 Cal. 3d 311, 330 (1985); see also Pardi v.  
4 Kaiser Found. Hosp., 389 F.3d 840, 852 (9th Cir. 2004).  
5 Defendants contend that plaintiffs have failed to  
6 sufficiently allege the existence of a contract or some  
7 other economic relationship between plaintiff and a third  
8 party containing a probability of future economic benefit.  
9 At the hearing, plaintiffs contended that defendants  
10 allegedly interfered with plaintiffs' economic relationship  
11 with their customers. While this can be inferred from the  
12 complaint, it is not clearly alleged. In repleading their  
13 complaint, plaintiffs should clarify the economic  
14 relationship with which defendants allegedly interfered.

15 Defendants' motion to dismiss plaintiffs fourth claim  
16 for negligent interference with prospective economic  
17 advantage is **GRANTED** with leave to amend. Plaintiffs' have  
18 failed to sufficiently allege that defendants' owed them a  
19 duty of care. See J'Aire Corp. v. Gregory, 24 Cal. 3d 799,  
20 803 (1979).

21 Defendants' motion to dismiss plaintiffs' fifth claim  
22 for violation of RICO, 18 U.S.C. § 1961 *et seq.*, is **GRANTED**  
23 with leave to amend. Plaintiffs broadly allege on  
24 information and belief that defendants "conspired to, and  
25 engaged in, a racketeering scheme, which included numerous  
26 illegal acts including prostitution and unlawful employment  
27 agreements." FAC ¶ 111. To carry out this scheme  
28 defendants allegedly "conspired to, and did transmit wire

1 communications in interstate commerce via telephone calls  
2 in violation of 18 U.S.C. §§ 371, 1343 and 1346." FAC ¶  
3 115. At the hearing, plaintiffs conceded that they had not  
4 alleged that defendants violated a particular subsection of  
5 RICO.<sup>2</sup> Plaintiffs also clarified that they intended to  
6 predicate their RICO claims on violations of the Travel  
7 Act, yet this is not alleged. See 18 U.S.C. § 1952.

8 A RICO claim predicated on acts of fraud must be pled  
9 with particularity pursuant to Rule 9(b) of the Federal  
10 Rules of Civil Procedure. Edwards v. Marin Park, Inc., 356  
11 F.3d 1058, 1065-66 (9th Cir. 2004); Tate v. Pacific Gas &  
12 Elec. Co., 230 F. Supp. 2d 1072, 1084 (N.D. Cal. 2002).  
13 This requires the plaintiff to particularize the "time  
14 place, and manner of each act of fraud, plus the role of  
15 each defendant in the scheme." Tate, 230 F. Supp. 2d at  
16 1084 (quoting Lancaster Cmty. Hosp. v. Antelope Valley  
17 Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991)).

18 Plaintiffs are granted leave to amend the complaint to  
19 state with particularity those portions of their RICO claim  
20 that are predicated on acts of fraud. If plaintiffs intend  
21 to rely on other predicate acts to support their RICO  
22 claim, they should so allege in their complaint. While  
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24 <sup>2</sup> 18 U.S.C. § 1962 lists four separate acts which  
25 form the basis for RICO liability: "(a) to invest income  
26 derived from a pattern of racketeering activity in an  
27 enterprise; (b) to acquire or maintain an interest in an  
28 enterprise through a pattern of racketeering activity; (c)  
to conduct the affairs of an enterprise through a pattern of  
racketeering activity; or (d) to conspire to commit any of  
the above acts." See Diaz v. Gates, 354 F.3d 1169, 1172  
(9th Cir. 2004) (citing 18 U.S.C. § 1962(a)-(d)).

1 defendants raise a host of other issues with respect to  
2 plaintiffs' RICO allegations, I need not address each of  
3 them in light of the fact that I have granted plaintiffs  
4 leave to amend.

5 For the foregoing reasons, **IT IS HEREBY ORDERED** that  
6 defendants' motion to dismiss plaintiffs' second through  
7 fifth claims is granted in part, and denied in part.  
8 Defendants' motion is **DENIED** with respect to plaintiffs'  
9 second claim, and **GRANTED** with leave to amend with respect  
10 to plaintiffs' third through fifth claims. Plaintiffs must  
11 amend their complaint by **July 25, 2005**. In amending,  
12 plaintiffs should consider the concerns expressed at the  
13 hearing as to whether the proper party plaintiff is before  
14 the court.

15 Dated: July 6, 2005

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17 Bernard Zimmerman  
18 United States Magistrate Judge

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